

UNOFFICIAL TRANSCRIPT

We have attempted to designate the name of the Justice asking each question based on notes of people who attended the argument. We believe these designations are correct but cannot guarantee their accuracy.

WASHINGTON LEGAL FOUNDATION, ET AL., Petitioners v. LEGAL
FOUNDATION OF WASHINGTON, ET AL.

No. 01-1325

SUPREME COURT OF THE UNITED STATES

December 9, 2002, Monday, Washington, D.C.

CHARLES FRIED, for the Petitioners.

DAVID J. BURMAN for Respondent Legal Foundation of Washington.

WALTER DELLINGER for Respondents Justices of the Supreme Court of Washington.

JUSTICE STEVENS: We'll hear argument in Number 01-1325, Washington Legal Foundation against the Legal Foundation of Washington.

Mr. Fried, you may proceed when -- whenever you're ready.

ORAL ARGUMENT OF CHARLES FRIED ON BEHALF OF THE PETITIONERS

MR. FRIED: Thank you, Justice Stevens, and may it please the Court:

I wish to argue four propositions. First, that the interest in these IOLTA accounts is the private property of Brown and Hayes, the clients. Second, that it was not regulated; it was taken. Third, that it has value. And fourth, that an injunction or declaratory relief is an appropriate and practicable form of relief in this case.

Now --

J. STEVENS: Before you start, Mr. Fried, may I ask you one broad question? You don't agree, I take it, with the conclusion of the dissent in the court of appeals, which I don't think agreed with your fourth point.

MR. FRIED: No. I think we are entitled to a declaration, or to an -- or an injunction just as was received in Eastern -- in Eastern Enterprises, just as was received in Hodel v. Irving, just as was received in Nollan and Dolan. And in our -- in our complaint filed, we asked for declaratory or injunctive relief, so I think that is available, and it is a practical and proper form of relief in this case.

J. STEVENS: The only point I was really want -- you -- you do not understand the dissenters in the Ninth Circuit to have gone that far, though, do you?

MR. FRIED: How -- how far, Justice Stevens?

J. STEVENS: To have held that you're entitled to injunctive relief.

MR. FRIED: They did not go that far. They -- no, they did not. No, they did not.

J. GINSBURG: In fact, they specifically said this equitable relief would not enjoin takings, but would simply stop Washington Supreme Court from requiring the LPO's to comply with the IOLTA rules.

MR. FRIED: Well, if the injunctive relief, which we asked for -- and here in the -- the complaint, I believe, is on page 100 of the -- 100 of the joint appendix. I think it's on -- no, I'm sorry. It's -- yes, in the -- in the joint appendix. We ask specifically for injunctive and declaratory relief in general.

Now --

J. O'CONNOR: Mr. Fried, what plaintiffs have standing to ask for injunctive relief in this case?

MR. FRIED: Certainly Brown and Hayes. There's a question whether Daus and Maxwell do, but certain --

J. O'CONNOR: But in the -- in the complaint was an injunction sought on behalf of Brown and Hayes?

MR. FRIED: Yes. An injunction was sought in general. A general injunction was sought. I'm sorry. I'm not putting my hand on the -- on the section in the complaint, but --

J. O'CONNOR: I -- I thought it read to the contrary, that it was on behalf of the LPOs.

MR. FRIED: It was on behalf of the LPOs, but then finally -- yes. Now I have it. Thank you. In the joint appendix on page 30, we ask specifically that they permanently enjoin the defendants. This is paragraph 3. So we asked for that relief, yes.

J. O'CONNOR: And -- and you ask for it now on behalf of Brown and Hayes, not --

MR. FRIED: We certainly do.

J. O'CONNOR: -- on behalf of the foundation.

MR. FRIED: We -- we ask for it on behalf of any and all parties in this case.

J. GINSBURG: Mr. Fried, the question that Justice Stevens raised, which I was then addressing, was not what was in your complaint, but what was the position of the dissenting judges in the Ninth Circuit. And I read from that dissent -- so you are clearly asking for something that the dissenters did not say you would be entitled to when they said --

MR. FRIED: We are asking for more than the dissenters would have given us. That is correct, Justice Ginsburg.

J. GINSBURG: Yes. They said the equitable relief would not enjoin takings.

MR. FRIED: Yes. We are asking for more than that. We are asking for it because it's very clear on this Court's precedents that where compensatory relief would be impracticable, or is not contemplated in the program, an injunction is -- is proper. And this Court has on numerous occasions in very similar cases granted injunctive relief.

J. GINSBURG: You -- you mentioned your complaint, and then we have this passage in the dissent. When did the idea of an injunction of the takings -- when was that squarely presented to any court? Because it would seem that if you had presented it, that this is rather curious, what we get in the dissent.

MR. FRIED: It's been presented throughout, Justice Ginsburg, and in fact, in the Fifth Circuit case, which is virtually identical to this case, not only was it presented, but an injunction was granted. And exactly the injunction which we received --

J. GINSBURG: If you just could tell me at what point you made it clear to the court that you were seeking not what is described here, that is, that the -- that the injunction would be addressed to the compliance of the LPO's with the IOLTA rules.

MR. FRIED: I think that the -- I submit, Justice Ginsburg, that that paragraph, which I have read to you, makes that clear.

J. GINSBURG: But that paragraph --

MR. FRIED: And in the summary -- and I'm -- I'm informed that it was also made clear in our summary judgment motion. So that the courts were well aware, as the complaint should have made them aware, but also were well aware that we were seeking an injunction for all parties in all respects. And after all, that is precisely the relief that was obtained in the Fifth Circuit case.

J. KENNEDY: Let -- let me see if I can help you get to the other major parts of your case by asking this question.

In Loretto, could the property owners have obtained an injunction against piercing the building for the little antenna or the wire on the grounds that there was no compensation? I doubt it. I would think the government, after Loretto, would continue to be able to poke the holes in -- in the wall -- or maybe I'm wrong -- even though compensation was negligible. Could there have been an injunction there, and if the answer is, well, no, why can there be an injunction here? And maybe that gets you to the --

MR. FRIED: They --

J. KENNEDY: -- the nature of the taking that occurred in this case.

MR. FRIED: The -- I think that's exactly the reason. If there were an -- if there is compensation in this case, exactly as the Court said in Eastern Enterprises, it would -- in effect, compensation being dollar-for-dollar is the equivalent of shutting down the program. And that was the case in Webb's as well.

I -- I might just mention, Justice Kennedy, that the respondents throughout this case say that the Eastern Enterprises case, which is very important to our injunctive claim, was really only a plurality. There was not a majority for the Court. I don't believe that the fifth Justice, which was yourself, disagreed with the remedy.

And indeed, the fifth Justice said that this was not a takings case -- Eastern Enterprise -- because unlike this very case we have, this was not the -- the -- you said, rather the exaction is a forced contribution to general government revenues. I'm sorry. I'm reading the wrong -- I'm reading the wrong passage.

In the Eastern -- Eastern Enterprises case, you said that the reason -- the reason that you didn't think that was a takings case was that a valuable interest in an intangible or even a bank account or accrued interest, which is, of course, this case, had not been appropriated. Well, this is a bank account and a crude interest --

J. KENNEDY: Well, what about my hypothetical on Loretto? I -- I take it Loretto establishes that there was an invasion, a taking --

MR. FRIED: Yes.

J. KENNEDY: -- but let's -- let's assume that the compensation was just so minimal it just really couldn't be calculated. It was 10 cents or something. Could you have had an injunction against installation of the antennas in Loretto on the ground that the compensation can't be figured? I think not. And if that's -- if my conclusion is right about that, how is your case different?

MR. FRIED: My -- our case is different because in this case, as in Webb's, as in Eastern Associates, to give compensation is to simply erase the program. While in the case where physical property is taken, to give compensation still leaves it open to use that property while -- where what you have is money and you must make compensation for that, then to make compensation for a dollar is to pay a dollar. That's what the Court said in Eastern Enterprises.

J. BREYER: Why doesn't that just prove that you have the wrong clause of the Constitution? That is, your clause of the Constitution, the one you're pushing, says, nor shall private property be taken for public use without just compensation. Foreseeing that you can take the property for public use, you just have to pay money for it. Just compensation.

Now, if paying the just compensation can't work out, or it's too hard or, you know, the person doesn't have enough of an interest to get anything, that doesn't mean the government can't take it. It just -- if there's something wrong with it, it means that that that which is wrong with it is that it violates the Due Process Clause, not the Just Compensation Clause.

MR. FRIED: That would be correct if Webb's had been a due process case, but it was not. It was a takings case. And in Webb's, they didn't say you can take that interest so long as you pay just compensation for it. They say, you've got to stop.

J. BREYER: Then the rationale -- you'd say even -- I mean, occasionally some case does have something that's a little hard to follow, but the -- the theory that that is consistent with the Just Compensation Clause, rather than the Due Process Clause, is?

MR. FRIED: That it makes no sense. It's not that it's hard to calculate. We would be happy to argue how you would calculate it. The point is that to calculate it and to pay the just compensation is to shut down the program. It makes no sense. There's no program left after you have paid just compensation.

J. O'CONNOR: Yes, but if -- if it is shown -- and I guess we don't know here because it hasn't been determined. If it is shown that no compensation is due because it wouldn't have earned or produced anything, then how is it a taking? I mean, that's -- because the Takings Clause refers to the taking without just compensation. If the compensation is 0, how is it a taking?

MR. FRIED: The compensation is not 0, and the premise of the --

J. O'CONNOR: If. If it were, how -- how is it a taking?

MR. FRIED: If it were. But the --

J. O'CONNOR: Well, then what is your answer? Is it a taking if the just compensation is 0?

MR. FRIED: Yes. It is a taking, but it is -- as the -- because this Court --

J. O'CONNOR: How is it in -- in the language of the clause?

MR. FRIED: Because this Court in Phillips has held that economic -- that -- that there is private property and it has value even though it has no realizable economic value.

But we do not concede that there is no economic value here, and the fact that it could not have earned interest --

J. O'CONNOR: But that has not been determined, has it?

MR. FRIED: Yes, it has. It has been determined. It has been determined and conceded by the respondents that there is interest in this case of \$5 and \$2. They go on to argue, ah, yes, but absent the IOLTA program, that would not have been earned. This Court in Webb's specifically addressed that point and said, we accept the proposition that apart from the statute, Florida law does not require that interest be -- be earned on registered deposits. So it was quite clear. This is just another version of --

J. STEVENS: But weren't those gross figures rather than net figures? Those --

MR. FRIED: Those are gross figures, yes, Justice Stevens.

J. STEVENS: But can we assume, along with Justice O'Connor's question, that there's no net loss to the property owner? We assume the -- the interest is the -- goes with the principal, and therefore it's property, and property has been taken. But has there been any net loss to the person from whom the property has been taken?

MR. FRIED: Perhaps and perhaps not. Let's say that there has not. I -- we argue that that does not matter. It is the gross -- it is the gross interest that is in -- involved here --

J. STEVENS: Even if it had been --

MR. FRIED: -- and that is the point --

J. STEVENS: Do you agree if it was a taking and you were to get just compensation, you would get the net loss rather than the gross loss?

MR. FRIED: No. We would get the gross loss. I think the --

J. GINSBURG: You -- you again, Mr. Fried, are going quite beyond the position of the original panel, later the dissenters in the Ninth Circuit, who made it clear -- and this is on page 83a of the original panel decision -- that said, just as a client is not entitled to the full amount that a lawyer collects for him, but only that amount less the lawyer's reasonable expenses and fees, so just compensation for the interest taken by IOLTA, after IOLTA causes the interest fund to exist, is something less -- is something less -- than the amount of the interest.

MR. FRIED: That is what the dissent says. We do not agree with that.

What we agree with is what this Court said in Phillips when this Court said that -- and it used the example of the rents -- the government may not seize rents received by the owner of a building because it can prove that the costs incurred in collecting the rents exceed the amounts collected. If the argument that's being made now were correct, then that statement would be incorrect because it would mean --

J. SOUTER: Well, isn't the difference --

MR. FRIED: -- that the government may seize those rents.

J. SOUTER: Isn't the difference, Mr. Fried, that in the -- in the rent example, what the -- what the members of the Court were assuming was that if somebody wants to be a bad businessperson, he's perfectly free to do it, and until he goes bankrupt, or loses the property, he can collect the rent.

The situation here is different because the situation here is such that there's nothing to collect. The -- the way the background principles of the banking statutes are set up, or -- which are effected by the banking statutes means that the -- the rent, the penny, the interest, never gets to the person who owns the principal. And isn't that why -- isn't that exactly why Phillips does not determine the result in this case?

MR. FRIED: I think not, Justice -- Justice Souter, because the Court in Phillips said specifically this interest -- so it assumes there is -- this interest is the private property of the clients, Brown and Hayes. It said that this is -- that's what this Court said. It is their property. Now, it doesn't disappear as their property because they would incur expenses in collecting it.

J. SOUTER: Well, I may not be the -- the best expert on what the -- what the majority meant by that.

(Laughter.)

J. SOUTER: But I think thought what the majority meant by that was that when you aggregate, as -- as is the case in these IOLTA accounts, of course there is a fractional sense that is attributable to every item that -- a fractional sense of the interest that's attributable to every item that goes into the aggregation, but it doesn't follow from that that any of that attributable amount could ever be netted out and ever be received under the banking statutes by those individuals to whom it is attributable. If, in fact, it were the other way, then the IOLTA scheme would force a separate NOW account to have been set up.

MR. FRIED: The -- the Court certainly did not say that any of that interest could be netted out and paid net to Brown and Hayes, but it did say, quite unambiguously, that that interest -- not in some general sense, but exactly that interest -- was the private property of clients, Brown and Hayes.

Now --

J. BREYER: Was it taken from them? So, I mean, I -- I can see why you see Webb is very, very similar, but the difference that I saw is that Webb says the money should be deposited in an ordinary interest-bearing account, and here it's being deposited in a -- in an account that is really the creation of the government's program that just couldn't have borne interest unless you collect all these funds together. So without this program, the person couldn't have earned interest.

Now, has the government taken that? If they have taken it, then why didn't the government take it when they -- when they tax it. Suppose the tax law was illegal because it's very unreasonable. Why

wouldn't that then be a taking? Why wouldn't the government take it when the government has a currency reg that imposes certain conditions upon the use of that interest?

I'm back to the same point. Why isn't this really a due process problem, not a takings problem?

MR. FRIED: Well, that's a -- I mean, that is -- that is an argument which depends on traversing the premise established by this Court in Webb's and Phillips.

J. BREYER: That's why I -- I said the difference in Webb's is that in Webb's it's an ordinary interest-bearing account. Here it's an account that is nonexistent without the IOLTA program coming in and saying we will put funds together, and those funds could not have earned interest on their own.

MR. FRIED: Well, that is the argument that the Solicitor General made in Phillips, that this is government-created property, and it was rejected.

J. BREYER: I'm making the same argument in respect to taking.

MR. FRIED: And it was rejected by this Court. It was rejected.

J. KENNEDY: But do you agree with that -- that premise? Couldn't a -- a group of attorneys or real estate brokers form their own consortium and say in order to avoid wasting this interest, we're going to put the interest in a special fund and we'll give clients a check-off system where we'll expend it the way they want? Private -- private enterprise could do exactly what IOLTA is doing, could it not?

MR. FRIED: It might very well.

J. KENNEDY: If -- if the government let it, and just because the government doesn't want to let it, doesn't mean the government has a right to do it on its own. Isn't that your point, or isn't it --

MR. FRIED: Well, that is -- that's one of the points.

J. SCALIA: Well, it could do it theoretically, but as a practical matter, computing the -- the various payouts would -- would be so expensive that -- and the payouts so small that it's just not practicable. Isn't that --

MR. FRIED: If I could just address the gross-versus-net point. The interest to which we are entitled, to which the clients are entitled, is -- it was calculated by respondents -- \$5 and \$2. That is the amount to which they are entitled. It may well be that along the way, the accountants will say, fine, and we'd like \$3.50 of that, and the lawyers may say, fine, and we want actually \$4 of that. And it may well be that at the end of the day they don't have any money. That's not any of the government's business.

J. GINSBURG: But that -- that was not the position that any judge has brought so far because the original panel that held in your favor said, yes -- and I don't want to repeat myself, but something less. It would be something less than the amount of interest.

I have a question that -- that's puzzling me about this theoretically we could have it separate. I thought that the program can only work, as far as the tax law is concerned, if the client has no control over the disposition of --

MR. FRIED: That is correct.

J. GINSBURG: -- that interest. If the client has control, then it's taxable to the -- then it -- interest like any other interest would be taxable.

So, here, the IOLTA has this peculiar aspect to it. You can ... it's interest belonging to the client, but that client has no right to dispose of it as long as it's going to be nontaxable income.

MR. FRIED: The client has a right to dispose of it, but -- or ought to have a right, under the Constitution, has a right to dispose of it --

J. GINSBURG: But then it would be interest --

MR. FRIED: -- but he will pay taxes.

J. GINSBURG: Yes. But that's another --

MR. FRIED: That's -- that's life.

J. GINSBURG: -- another -- I would like to go back to a very basic question, and it's -- it's essentially this. If you had not -- no IOLTA program with the tax advantage that you get that makes the whole thing work, and we went back, we just got this injunction, stop it all, it seems to me the big gainer, the person who is really benefiting, and who lost the last time around is the bank because the bank had the free use of these funds, and IOLTA comes along and takes it. It really takes it away from the banks. And then if you succeed, it goes back to the bank. Am I right that that's the --

MR. FRIED: It may. It may go back to the bank, which, in a competitive industry, would presumably work its way down to the -- to the clients, but I don't need to make that argument.

J. SOUTER: Why -- why don't you, though, have to make exactly the same argument if IOLTA goes down the drain -- compulsory IOLTA goes down the drain on your theory? Why don't you have to make the same argument about the -- the background government regulation which, in effect, gives the interest to the bank?

MR. FRIED: It doesn't give the interest to the bank.

J. SOUTER: Sure, it does. It says, look, bank, you can take in money, but you can't pay out any interest on it. You can't pay out interest on a straight checking account and you can't pay out NOW interest to a corporation. Therefore, in effect, you get to keep it.

MR. FRIED: Well, the --

J. SOUTER: And the -- the effect of that, it seems to me, is just as much to deprive your client of the \$5, if there is any deprivation at all, as -- as it is to deprive it when it says IOLTA gets it instead of the bank.

MR. FRIED: Yes.

J. SCALIA: Except your -- your client is not compelled by -- by those banking regulations to deposit any money in the bank, is he?

MR. FRIED: No, it is not.

J. SOUTER: And your client, I suppose, is not compelled to engage in this consensual transaction with the broker.

MR. FRIED: It is -- the client is compelled to engage in it if he wishes to buy and sell real estate.

J. SOUTER: And the client --

MR. FRIED: He's not compelled to buy and sell real estate.

J. SOUTER: And the client is compelled to deposit the money if it wishes to get banking services. But in no instance -- either the IOLTA case, or the background regs case -- does the government say to the person with \$10 in his pocket, you've got to put it in the bank, or you've got to spend that money on real estate.

MR. FRIED: Well, indeed, not.

J. SOUTER: But the compulsion is the same one way or the other.

J. SCALIA: I think -- I think the point is that -- that your client must -- must be willing -- what is it -- must deposit money in the bank if he wants to deposit money in the bank. That's the compulsion here.

MR. FRIED: He must --

J. SCALIA: He must deposit money in the bank if he wants to deposit money in the bank.

MR. FRIED: He must deposit money in the bank if he wants to buy and sell real estate, the way you have to pay money to a grocer if you want to eat.

If I may, I'd reserve the balance of my time for rebuttal. Thank you.

J. STEVENS: Mr. Burman.

ORAL ARGUMENT OF DAVID J. BURMAN ON BEHALF OF RESPONDENT LEGAL FOUNDATION OF WASHINGTON

MR. BURMAN: Justice Stevens, and may it please the Court:

I would like to start with the question that Justice O'Connor posed because I think it goes to the heart of the flaw in plaintiffs' case. There is an independent requirement -- an independent element of their cause of action which is that they show that there was just compensation due and denied by the State of Washington. That has not happened here.

J. KENNEDY: So the position of the State of Washington is that it can take any property so long as it doesn't have -- so long as compensation can't be calculated.

MR. BURMAN: No. The position is that there is no unconstitutional taking if we would pay compensation. Certainly the -- the plain language of the clause says the property may be taken.

J. KENNEDY: Doesn't -- doesn't the State have some duty to recognize that the Constitution protects property and it shouldn't take property that doesn't belong to it?

MR. BURMAN: In certain circumstances, the Just Compensation Clause acts a shield.

J. KENNEDY: So -- so if you can get it --

MR. BURMAN: The process might well --

J. KENNEDY: So if you can get away with taking property just because it can't be valued, then you can take it.

MR. BURMAN: That is not --

J. KENNEDY: That's the position of the State of Washington.

MR. BURMAN: That is the position of this Court's cases, not the position of the State of Washington, which does not go that far. Our position is that --

J. O'CONNOR: Well, there might be some due process claim, mightn't there?

MR. BURMAN: One was not stated here.

J. O'CONNOR: We're trying -- what -- what we're looking at here is a takings claim.

MR. BURMAN: Correct. Other plaintiffs might well have a due process claim. These plaintiffs may well still have a First Amendment claim since their real complaint with this is their subjective ideological one, subjectivity which this Court has said is not the business of the Just Compensation Clause.

J. SCALIA: Once again, I -- \$5 and \$2. It's not a whole lot of money, but it's their money. Why -- why do you say it can't be calculated?

MR. BURMAN: Under this Court's cases, it is not their money. The Court has been very careful to say that what we look at, because the Just Compensation Clause is a type of indemnity provision that is worried about responding with -- to loss of pecuniary or monetary value -- the Court in the parcel aggregation cases, such as *Boston Chamber and Sage*, made it very clear that if it is not economically practicable, if the costs of aggregation would exceed the benefit, there is no just compensation.

J. SCALIA: But you're -- there you're talking about something that has to be sold for money. This is quite calculable. We know exactly how much interest was paid, and we know that that interest belonged -- under our case law, belongs to these plaintiffs. What -- what is the problem? \$5 and \$2.

MR. BURMAN: Answering the question of whether it's property, as the Court made clear in *Phillips*, does not answer the question of whether there is a taking, or the question of whether there is just compensation.

J. SCALIA: Well, who has the \$5 and \$2?

MR. BURMAN: The government does, as it had the additional value in the cases such as the *Boston Chamber* case, and in --

J. GINSBURG: Mr. Burman, am I right? It's not \$5 and \$2. That's gross. And with the --

MR. BURMAN: That is gross. And, in fact, in *Webb's*, the very case they rely upon, the Court said the government can deduct the cost of protecting that money before you calculate what is due. That is exactly what happened --

J. BREYER: Right. That's why he says he wants the injunction.

MR. BURMAN: *Webb's* did not have an injunction.

J. BREYER: I know it didn't. It didn't need it. And his point was -- his point was that since -- if you could theoretically give the compensation, which is impossible for the reason you say --

MR. BURMAN: It's --

J. BREYER: It's impossible. They're not entitled to anything in cash. But look, if you could do it theoretically, there would be no more program, so give us an injunction because it comes to the same thing.

MR. BURMAN: Where the textual language is just compensation, and where the value is economic or pecuniary or monetary loss, as this Court's cases often say, it's not just that there is no way to remedy this problem. There is no remedy called for by the Constitution. The remedy is just compensation. I take this --

J. KENNEDY: Suppose -- suppose there were a State in which a group of lawyers or real -- people with real estate accounts got together and say, we really should pool this interest and we'll give our clients a choice of four different things that they can allocate the money to. And we're just going to do that as a service, and we think it's good business. Actually we might -- the company that does this might make a few dollars themselves.

If that were in place, could the State of Washington do what it does now, say, you know, this looks like a good idea? We think we'll take it for what we like.

MR. BURMAN: That may be a very different case. These plaintiffs have never tried that. That is not their complaint. They make no allegation --

J. KENNEDY: But can -- do they even have the possibility of trying that given the regulation that you now have?

MR. BURMAN: Actually, we don't know that.

J. KENNEDY: You've taken away, in effect, a business opportunity, have you not?

MR. BURMAN: No. We don't know that that's the case because they've never presented it to the State supreme court.

J. KENNEDY: Well, it's certainly profitable for you to do it. Why do you think you can do what private business can't?

MR. BURMAN: Our burden is not to come up with hypotheticals for other cases that they might bring. These two plaintiffs brought their case.

J. KENNEDY: Well, your burden is to answer hypotheticals --

MR. BURMAN: Yes.

J. KENNEDY: -- that establish whether or not a property interest is being taken in violation of the Constitution here.

MR. BURMAN: Correct, Your Honor.

J. KENNEDY: And you say that simply because it can't be computed, A, because of the small amounts, and B, because of the government's unique program, that it is not property anymore.

MR. BURMAN: And the difference is what is unique about the government's program and what Boston Chamber says would be relevant, if individuals could do it, was aggregation that reduces the transaction costs. In a hypothetical where --

J. SCALIA: Now, does -- does this mean -- let's -- you know, banks pay higher -- higher amounts for certain deposits above a certain amount. And you're saying that if the government passes a law that says I have to -- I have to deposit my \$5,000, together with other people's \$5,000, thereby getting additional interest for all of it -- right -- you can keep the interest because I wouldn't have gotten it anyway.

MR. BURMAN: Justice Scalia --

J. SCALIA: What a -- what a wonderful scam.

(Laughter.)

MR. BURMAN: There is an element of compulsion there that is not present here, and there is no -- you -- you posit no regulatory purpose. This arose out of a clear regulatory purpose to --

J. SCALIA: I don't care if there's -- there's a regulatory purpose or not. I mean, that -- that may go to some other -- some other element, but as -- as to whether you've taken my property, the interest was paid because of my \$5,000, and then you come back and say, oh, yeah, but you wouldn't have gotten that much because you wouldn't have been -- well, that's true. I wouldn't have, but the fact is I was in with those other people and I did get them more money, and that more money is mine.

MR. BURMAN: And -- and they should present that argument. It may well be that they could come up with a scheme that would reduce the transaction costs and create a net value, and the plain language of the rule says if that happens, the lawyer has to honor it.

J. BREYER: They're -- they're arguing --

MR. BURMAN: It is the lawyer's obligation.

J. BREYER: All right. I think they're saying, I agreed with you. You know, I agreed with you. But I wrote a dissent. So they're saying that was a dissent. You lost. Now, it is the law of the United States that this is property. Indeed, it is their clients' property.

Now, you tell me on that assumption, since I lost, why is it not a taking of that property for which they are entitled to just compensation, and, in this case, the just compensation would have to take the form of an injunction. Now, unless -- I'm -- I'm anxious to hear the answer to that point.

MR. BURMAN: You lost only on the question of whether the majority should have looked at those additional elements. The majority was very clear to say we express no opinion. We state no view on these other questions. That would be nonsensical if in fact it follows automatically from what the majority said, but clearly that's not the case.

J. BREYER: Good. So tell me why it doesn't.

MR. BURMAN: With respect to the injunction question, if I could jump ahead to -- to that part of your hypothetical, Eastern Enterprises, we believe, is a different situation where, as in the Youpee case, the Court basically said Congress could not intended this circularity, and so we are not going to read the statute that way. This is different when you have the State, and it's different where, even the dissenters in the Ninth Circuit below admitted that the amount due, if any, is going to be smaller than the gross interest. In cases such as Webb's, in cases such as Sperry, even in Phillips, the Court seemed to acknowledge that the deduction made sense.

J. KENNEDY: But Justice Breyer's question I think was, is there or is there not a taking of property here?

MR. BURMAN: There is property. We believe there is no taking, and Mr. Dellinger will address that perhaps more directly than I will. But it is --

J. KENNEDY: How -- how would you define what's happened to the property? It's been regulated out of existence?

MR. BURMAN: The property was transferred, just as in Connolly, just as in Eastern Enterprises.

J. KENNEDY: Oh, it's been transferred but not taken.

MR. BURMAN: Correct. It has not been taken by applying the multi-factor test that the Court says applies when you have a transfer of dollars, which is what happened in those cases. And when you apply that test, these plaintiffs admit no investment expectation, no net economic loss.

J. KENNEDY: It -- it seems to me an odd rule that it's not a right of the owner to decide to whom the owner can transfer the property.

MR. BURMAN: These owners transferred the property to an intermediary on its way to a third party. It would be a really odd rule if somehow the right to exclude was independent of the economic value of money. Just as interest may follow principal, it would make sense that the right to exclude has to follow the economic value when you send it to an --

J. O'CONNOR: Mr. Burman, let me ask you something as a practical matter. If the Court disagreed with you and concluded there was a taking and they were entitled to some relief, can the problem be solved by simply adding a little explanatory provision in the proposed escrow instructions, that if you don't want your money in the combined account, you can do something else with it?

MR. BURMAN: The -- the --

J. O'CONNOR: Otherwise, it's going in the IOLTA account.

MR. BURMAN: The problem if -- as I understand it, is that if you give the client the right to opt out, the IRS says that becomes taxable. We're not saying that you net out the taxes --

J. O'CONNOR: It would become taxable to the person opting out.

MR. BURMAN: Correct, and that --

J. O'CONNOR: But not to everybody else. If the -- if -- if the person entering into the escrow says, having understood it, look, if I opt out, I'm not going to get anything, so I don't care, you can do this, would -- could it still function?

MR. BURMAN: It -- I believe it might well be able to function, and I think it's important that there's no compulsion --

QUESTION: How could it? They're --

J. SCALIA: Are you sure it's not taxable to the person who opts out?

MR. BURMAN: It is -- it may be taxable to the person who opts out.

QUESTION: Not to the others?

MR. BURMAN: It may not be to the others. I don't know the --

J. GINSBURG: Why not? Because that person would have disposition either way.

MR. BURMAN: Oh, if they had the right. You -- and -- you're correct.

J. GINSBURG: And -- and in order to have this scheme work, the client cannot have any control over the disposition.

MR. BURMAN: I stand corrected.

J. GINSBURG: So you couldn't do -- you couldn't do this --

MR. BURMAN: And it's not the tax that needs to be netted out. It's the cost of individually recording, tracking, paying, and reporting to the IRS that eats up these nominal amounts. That is the problem here.

If I could make one correction to something Mr. Fried said. There is no compulsion here. You don't have to go to an escrow agency that has an LPO or a lawyer. You can go to one that does not have one. In Washington and many States, that's the case. There is no compulsion here --

J. STEVENS: Except correct one -- or explain one thing to me. I thought that if it netted out so that there was no net amount available to the depositor, that -- I mean, the other way around. If it

netted out that there was -- something was due, even 5 or 10 cents, then that would be improper, and you'd have to give them the money back.

MR. BURMAN: Absolutely. Banks effectively encumber interest with their charges. That's what the plaintiffs' complaint alleges. They say prior to IOLTA, banks paid no interest. They bundled and effectively encumbered it there. When required to separate it out, I can guarantee you, you won't be allowed to go to a bank and say, I'd like to withdraw my \$100 and my 5 cents of interest and maybe I'll pay a year \$5 in service charges later if I feel like it. That does not happen. This is money that is encumbered, and you should look at the net amount.

If there is no value lost, there is no taking under this Court's cases.

Kimball Laundry could not be more clear. In Kimball Laundry, the Court said for any --

J. SCALIA: -- back to my example. My example of you -- you compel a bunch of people to -- to contribute \$5,000 apiece. No money lost? I could not have made that -- that additional -- that additional interest on the \$5,000. So it's perfectly okay for the State to say, hey, you know, this -- this interest is ours. We made it on your money, but you couldn't have gotten it otherwise. That seems to me extraordinarily strange.

MR. BURMAN: If you compelled them to do it, that might be a different case. It is Mr. Fried's proposal, which I believe if he had a narrower argument he would have made it, but he gives you the radical and startling argument that you only look at the gross amount and even -- and that even if there is no net value due, which in case after case -- such as Kimball Laundry and Marion & Rye -- the Court has said, if no economic value lost, no fair market value, no violation.

Here you have a perfectly functioning market. The banks. They decide what is the fair market value of the time value of money and they encumber it within the costs --

J. KENNEDY: Well, it's not a perfectly functioning market when you have Federal and State regulations.

MR. BURMAN: That's part of the baseline that they do not challenge.

J. KENNEDY: If that's your definition of a functioning market, the -- it's the Federal Government that says it has to be deducted -- it has to be spent for charity purposes.

MR. BURMAN: It's --

J. KENNEDY: And I take it that regulation isn't attacked. I'm not sure why.

MR. BURMAN: Correct. They do not attack it. It's the Federal Government that creates a tax system that requires a lot of record-keeping. They do not challenge that baseline cost, and our argument is that for that reason, there is no value lost, no violation --

J. O'CONNOR: Now, what choice did the plaintiffs have in going into this arrangement or not?

MR. BURMAN: As in Yee and PruneYard and Florida Power, the plaintiffs voluntarily went into a transaction. They gave up their right to exclude. They gave up this interest for an intermediary for it to move on.

J. O'CONNOR: If they wanted to engage in the real estate transaction, did they have another choice?

MR. BURMAN: Certainly. They could have filled out the forms themselves, and gone to an escrow agent that did not employ an LPO or a lawyer.

Thank you.

J. STEVENS: Thank you, Mr. Burman.

ORAL ARGUMENT OF WALTER DELLINGER ON BEHALF OF RESPONDENTS
JUSTICES OF THE SUPREME COURT OF WASHINGTON

MR. DELLINGER: Justice Stevens, and may it please the Court:

To establish a violation of the Just Compensation Clause, let's remember there have to be three elements. There has to be property -- established by Phillips. There has to be a taking in the constitutional sense, and there has to be a denial by the State of just compensation.

Mr. Burman has suggested why that is missing in this case because there has been no just compensation that's denied. The justices of the Washington Supreme --

J. KENNEDY: Well, but -- but that's the issue before us. I'm just not sure of a precedent which says that if just compensation can't be calculated, the government is free to take someone's property for itself. And -- and I'm just baffled by what that principle might be.

MR. DELLINGER: Justice Kennedy, it is a taking when the government takes your property without a sufficient regulatory basis. And the compensation they owe you, if it is zero, and zero is paid, there is no violation. I know it is somewhat surprising since the founding generation was so wedded to rights of property, but the Fifth Amendment expressly confirms the authority of government to take property for public purposes, State, local, and National. They have to pay just compensation.

If they take \$1 million of your property and pay you \$999,000, they've violated the clause. If they -- if your property is worth \$10, and they pay you \$10, they haven't violated. And if it loses \$10 in value, and it's worth zero, then they owe you nothing. There's no denial, no violation of the Fifth Amendment.

Professor Fried would say in that instance, if the value declines from \$10 to zero, you enjoin them from taking it. That's not the answer. The answer is that the compensation is zero.

Now, in this case, by definition, as the justices of the Supreme Court of Washington -- insofar as the English language would permit it -- said we do not want to take property that individuals could earn on their own. They say at page 149 of the joint appendix from the original IOLTA order, in adopting these amendments to the Code of Professional Responsibility, we make clear that those funds available for the IOLTA program are only those that cannot under any circumstances earn net interest.

And they even were careful at page 165 of the joint appendix to say that as cost-effective subaccounting services become available, making it possible to earn net interest on smaller amounts for increasingly shorter periods of time, more trust money will have to be invested for a client's benefit under the new rule. The rule is self-adjusting. Unquote.

J. SCALIA: So you give -- you give the same answer to my \$5,000 hypothetical that your -- your brother would. Right?

MR. DELLINGER: My answer is that --

J. SCALIA: I mean, so long as the government sets it up that way and I couldn't make any more money, the money that the government makes on my money is the government's. Right?

MR. DELLINGER: Yes, because this Court's cases make it clear, Justice Scalia, that the amount of just compensation that is due is the amount of your loss. And if your loss is zero, there's no denial of just compensation.

J. SCALIA: I don't think the cases make clear what you have to deduct from it. What if -- what if it would be clear that I would have had to have to sue for it, and -- and I would have had to expend attorney's fees? Does that all have to be deducted from the just compensation?

MR. DELLINGER: No. I would not -- I would not count that as all. The -- the proper measure is what a willing buyer would pay a willing seller. In this instance, I think, it's the -- what is taken is the ability to use one's money to earn money for a period of time. What would a willing buyer pay for that?

If I have a few thousand dollars to invest for 72 hours and say to Professor Fried, you can pay me for the value of that -- my right to earn that money; if he goes to the bank and the bank says, you can deposit here for 72 hours, but when you come back, you will owe us money, he's going to pay me zero.

Now, if --

J. SCALIA: That's if you took his right to earn interest. But that's not what you took here. You took \$7. He did earn interest. It was not some abstract right to earn interest that was taken. What was taken was \$7.

MR. DELLINGER: I think that is a mischaracterization of the facts, Justice Scalia, that the money that he put in, if invested at that rate, in a world without transaction costs, would have earned that amount of money, but that world doesn't exist in the -- in the Milky Way.

J. SCALIA: Whose money earned the \$7?

MR. DELLINGER: The \$7 --

J. SCALIA: His money earned it, didn't it? And didn't we say in our earlier case that if it's his money that earned the interest, the interest belongs to him?

MR. DELLINGER: That's not the case because the --

J. SOUTER: Mr. Dellinger, isn't the -- isn't it -- it's their money that earned it. Isn't interest by definition that which is netted out that the bank pays you?

MR. DELLINGER: Precisely, it's --

J. SOUTER: And if that is the definition of interest, then there was no \$5. There was no interest earned on this amount. Isn't that --

MR. DELLINGER: That is exactly correct, Justice Souter.

J. BREYER: Or did -- did they -- I'd like to -- just to spend a couple of minutes at some point addressing the question of whether -- whether the program took it from him. That is to say, I guess there's a sense in which -- suppose a robber had come and said to the depositor, your money or your life. I mean, what would the depositor have done? I guess he'd be dead. This money wouldn't have existed. Did he take it from him? Did he obtain it from him? There -- there is a problem there that I'd just like you to address.

MR. DELLINGER: Justice Breyer, I think the cases make it clear that you look to what a willing buyer would pay a willing seller.

J. BREYER: That's compensation, but I wonder what about -- I mean, there is a sense in which the program took the money, but who did it take from? Did it take it from the property owner? Is there a sense -- or do you concede the point that there's a taking?

MR. DELLINGER: The money that is -- the money that is acquired -- taken in the common language sense -- comes from the money that is generated by the pool of funds. It's not money that could have been paid to the individual client. And these rules make it clear that if you could pay it to the individual client, because you can't -- you can't find out who he or she is, or allocate the money to them. So it has no net value.

J. SCALIA: I thought we decided that issue in Phillips. I mean, you could argue that point --

QUESTION: Yes.

J. SCALIA: -- but didn't we decide that point in Phillips, that there was a taking --

QUESTION: I don't know if we did that. I mean, property --

J. SCALIA: -- and that the property did belong --

MR. DELLINGER: Well, you -- you did decide in Phillips that the interest was property, but you have to look to what the value is.

J. SCALIA: Somebody's property or the property of -- of the --

MR. DELLINGER: It is the -- it is the property of the client, and if there is an -- a way of getting net interest to the client, these rules require it.

Now, several of the examples suggest --

J. GINSBURG: Mr. Dellinger, does -- Washington has the same program as in Texas? That is, if a mistake is made, and this money could have earned net interest, then you can get a refund.

MR. DELLINGER: Absolutely correct. You -- you inform the IOLTA program that the money could have earned net interest, and if that's true, the interest comes to you.

Now, several of the examples were in a sense more naked wealth transfers. What's different about this program -- we've -- we've addressed the fact that there's -- this third element of a denial of just compensation is missing, but I do want to address the fact that we don't believe that this is a taking because if you apply this Court's Penn Central analysis, all of the factors point in the same direction, in addition to the absence of investment-backed expectations.

This is a program that serves an important regulatory goal of avoiding the appearance of self-dealing by lawyers.

Now, it -- it raises money for an important cause. And we don't deny the importance of that to the program. It is a cause -- ensuring equal access to justice -- which enhances confidence in the system of justice, and helps the petitioners and everyone else who uses that system.

But the relevant regulatory interest noted by the justices at the beginning of their process is that where lawyers are placing funds of their clients in a bank, and the banks are in a position to benefit the lawyers, you have a risk of violating one of the first principles of legal ethics that lawyers are not to benefit directly or indirectly from their clients' funds.

J. KENNEDY: So the -- so this property can be misused and the State can take the property. That's -- that's your formulation.

MR. DELLINGER: That is not the formulation. The -- the funds have to be taken from the bank. They can't remain with the bank because of the serious ethical problem that was noted in the

briefing to the justices that the banks are earning interest and providing benefits to the very lawyers, or in the case the real estate escrow agents who placed the money there. If you can't economically return it to the client, if that cannot -- if that is not economically feasible, and you can't ethically leave it with the bank, then it has to go somewhere. It doesn't have to go to IOLTA. It has to go to some charitable use to avoid this ethical problem.

J. KENNEDY: Why can't -- why can't the private system design mechanisms so that clients and attorneys can designate the cause to which they want it to go? Then, they're having control over their property.

MR. DELLINGER: Well, there are two problems with that kind of -- of client control. One is the tax consequences to the client. If the client directs where the funds go, the interest would be attributable to the client.

And secondly, if you --

J. KENNEDY: Well, I suppose if the client designated a charity, that would be a charitable deduction. Maybe or maybe not.

MR. DELLINGER: That's correct. It -- it -- I think that goes to the right to control, and the government often regulates the right to control one's property, particularly in a heavy -- heavily regulated industry such as banking.

J. SOUTER: Mr. Dellinger, in -- in that -- I want to get clear on that example. If there were such a designation, leaving the tax consequence aside, isn't -- isn't it true on the facts under the Washington scheme that the cost of identifying the amount that would go to the charity would be greater than that amount so that, in effect, ultimately the -- the charity would net nothing, there would be no tax, a tax return would have to be filed saying zero. Is -- is that right?

MR. DELLINGER: That is -- that is precisely right.

Now, if you -- if you choose to have a law firm do your transaction, but the client says, I want some other escrow agent, and not the lawyer, then you don't get into IOLTA.

But here, I think we have a dispositive flaw in that there is simply no just compensation. And the reason there is no compensation is that it's actually quite complicated to track and allocate all of these funds. It may seem counterintuitive that you can't allocate that interest back. But in Texas, for example, if you look at, I think, footnote 2 of the -- of the brief of 49 State bars, in Texas, where they made \$5.5 million, it was on 40,000 attorneys' trust accounts that may have had as many as 1 million discrete deposits. And if we're wrong that -- and there's somehow you can allocate it back, you do so.

Now, the --

J. KENNEDY: Well, you could have a separate funds. You could -- you could have four different funds that attorneys could choose. You could choose Save the Whales, or help -- help litigation fee -

QUESTION: Or you can have an injunction.

MR. DELLINGER: It is possible but it is not required. I don't believe that the Fifth Amendment has a dog in the fight over -- over what charitable use the State of Washington chooses when they serve this important purpose of making sure that there is -- that there is not this ethical conflict.

There are really five different ways that we could win this case, just -- because there are so many pieces on the gameboard.

You could conclude that it's not a taking principally because it has a valid regulatory purpose.

It's not -- two, it's not a taking because of the absence of any real investment-backed expectations.

Three, even if it's a taking, we've established that zero compensation is due.

Four, even if you think some compensation might be due, they've never gone to the State -- not a single client -- and tried to prove up the amount of compensation, which is very much in dispute if you look at their earnings credit analysis, unlike Eastern Enterprises where we knew the exact amount, it's very much in dispute whether some or all of those costs would have been borne down.

And finally, even if you reject all our other positions, you then reach an argument that we don't need to make because we believe in our other arguments, and that is, why not treat this as a valid revenue measure? Unlike the bad revenue measures of Eastern Enterprises, where the State, or the Government was imposing a retroactive onerous burden on a few identifiable, known people, here it's prospective, reasonably broadly based, and raises -- and modest in the exaction. That looks even as a financial transaction.

J. SCALIA: Courts have the power to tax?

MR. DELLINGER: I'm sorry?

J. SCALIA: Courts have the power to tax?

MR. DELLINGER: Courts have the power -- and other agencies often -- to impose fees. That's a State law issue, but whether it's an IOLTA assessment, or a user fee, or however you want to characterize it, if you look at it like that, I'm not sure why it doesn't stand up quite well.

Whenever you're talking about money, you have to decide why isn't this just a valid way for the government to raise money? And part of the Takings Clause shares an overlap with the bill of attainder and the ex post facto. Are you singling out a few individuals retroactively, as Justice Kennedy focused on in Eastern Enterprises. Here you're not. Anybody who chooses to engage in X will pay Y. When X is a lot of people -- 40,000 in Texas -- and potentially all of us who do

transactions, and Y is a perfectly reasonable amount of money, nonexistent in our view, but minimal at worst under their characterization.

Thank you.

J. STEVENS: Thank you, Mr. Dellinger.

Mr. Fried, you have about 5 minutes left.

REBUTTAL ARGUMENT OF CHARLES FRIED ON BEHALF OF THE PETITIONERS

MR. FRIED: Thank you, Justice Stevens.

Just a few points. First, this is not a revenue measure. It is not a tax. It has never been argued to be a tax. Indeed, if it were a tax, we would have no complaint. Indeed, it is our answer to the arguments made, the dog-in-the-manger argument that was made in the court below, and the argument made by AARP, that if the government wants our money, they should get it the old-fashioned way. They should tax.

Now, the court said, and AARP said, it's inconvenient to tax because that comes with strings. That's called democracy. They don't like the strings. And so the bar association and the justices wish to acquire the money.

J. STEVENS: May I -- I shouldn't be taking your rebuttal time, Mr. Fried, but are you saying that if they did this by a statute, it would be perfectly okay?

MR. FRIED: No, I'm not saying that. I'm saying that if they did it as a --

J. STEVENS: -- as part of the revenue code.

MR. FRIED: -- as a tax -- if they did it as a tax because it --

J. STEVENS: Well, it seems to me the program was exactly the same, it was adopted by a legislature, and had the title tax on it.

MR. FRIED: Because in every jurisdiction and certainly in the Federal Government, taxes have to jump over certain hoops. There are institutional constraints, and it's exactly those constraints that the justices and the bar associations want to escape. They have told us so. It's all --

J. STEVENS: I'm not sure I know the answer to my question. If they did exactly what I said, would it be permissible?

MR. FRIED: It would be an entirely different question. I wouldn't want to concede it, but it would be a different question, and a harder one because this Court has granted greater leeway to tax, and the reason it has is because taxation is a recognized institutional form with lots of institutional hurdles that the respondents do not wish to endure. They wish to do -- do an end run around them.

Now, as to the regulatory purpose here, I think it's sufficient to note that prior to IOLTA, there were plenty of regulations -- both of escrow agents and lawyers -- to prevent them from self-dealing, and lawyers were disbarred if they violated them. This IOLTA measure was passed, and it was passed only as a way to raise funds for legal services. So I think that the regulatory purpose is an after-the-fact invention.

Now, also we do not say that it is impossible to value the taken here -- the amounts taken. It's perfectly possible. It's \$5 and \$2. It's simply impracticable to force Brown and Hayes to sue for it. That's the impracticability. It's not impossible. We do not say that. And that's why cases like Kimball Laundry are completely beside the point.

J. GINSBURG: Mr. Fried, may I ask you another question that is troubling me about this, in addition to the question of is it really the bank whose -- whose economic gain has been taken? But this is a question about the -- the class sets involved. Now, I know this isn't a class action, but the injunction is going to be to cover everyone in this group. And some of them may be outraged by this and others may say, we'd much rather that IOLTA get it than the bank. So there's something troubling about an injunction that's going to cover all of these people who may have very diverse views about what they would like to see happen.

MR. FRIED: Yes, and the solution for that is the political process rather than the process of judges and bar associations raising revenue. And under the political process, the result you describe happens all the time. It should not happen here.

J. GINSBURG: I'm not sure I understand that answer. If the choice is between the banks and IOLTA, and some of the people say we don't want to prefer the bank, we want to prefer IOLTA. You're -- you're making the choice for them in saying, you have to prefer the bank because we're enjoining it.

MR. FRIED: Well, we're enjoining it -- we are asking you to enjoin it because it is an illegal program. The result of the injunction, or a -- a declaration would be what you described.

J. STEVENS: Mr. Fried, you may have another minute if you didn't get your rebuttal through.

MR. FRIED: No. I -- I think that's --

JUSTICE STEVENS: Thank you.

MR. FRIED: -- sufficient. I thank the Court for its attention.